

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUL 17 1998

PATRICK FISHER
Clerk

JIMMIE ODELL BRUNER,

Petitioner-Appellant,

v.

RON CHAMPION; ATTORNEY
GENERAL OF THE STATE OF
OKLAHOMA,

Respondents-Appellees.

No. 97-7071
(D.C. No. 95-CV-293-S)
(E. D. Okla.)

ORDER AND JUDGMENT*

Before **KELLY, BARRETT**, and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Petitioner Jimmie Odell Bruner appeals the district court's decision to dismiss his 28 U.S.C. § 2254 petition for a writ of habeas corpus. The district court neither issued nor denied petitioner's request for a certificate of appealability. Pursuant to Federal Rule of Appellate Procedure 22(b) and Tenth Circuit protocol, we assume that the district court denied petitioner a certificate of appealability. Petitioner requests this court issue a certificate of appealability and reverse the district court's dismissal of his § 2254 petition.

After a mistrial, petitioner was retried and convicted of first degree rape, first degree burglary, and robbery by force and fear. Petitioner's conviction and sentence were affirmed on appeal to the Oklahoma Court of Criminal Appeals. Petitioner filed his § 2254 petition for a writ of habeas corpus in the United States District Court for the Eastern District of Oklahoma. The district court adopted the findings and recommendation of the magistrate judge and dismissed the petition.

In order to obtain a certificate of appealability, petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Based upon our review of the record as a whole, we conclude that petitioner has failed to make the requisite showing.

Petitioner's "Motion for Order Requiring Answer Brief" is DENIED.
We DENY petitioner's request for a certificate of appealability and DISMISS
his appeal. The mandate shall issue forthwith.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge